No. 16,322

United States Court of Appeals

For the Ninth Circuit

S. A. Peters and Timber, Inc., of California,

Appellants,

vs.

Kal W. Lines, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt,

Appellee.

APPELLANTS' REPLY BRIEF.

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STATEMENT OF FACTS.

While in his brief Appellee attempts to take issue with the soundness of Appellants' "Statement of Facts", we feel that the statement (A.O.B., pp. 10-12) is well documented in the record and is supported by the citations to the record contained therein.

Appellee's "Statement of Facts" is, we submit, much more of an argument than a statement of facts, and most of the observations contained therein are repeated at various stages of Appellee's brief as part of his argument. The inapplicability of the selected, and we submit slanted, statements made by Appellee

in his "Statement of Facts" becomes more apparent later in this rebuttal. However, one glaring defect appears on page 9 of Appellee's Brief. Appellee attempts to charge Appellants with damages at $28.50 per hour for "woods workers' wages alone for each crew", on a basis of 30% of the total hours (17,113) worked during the period June 1—October 15, 1933 (Trustee's Exhibit No. 17) or 5,134 hours at $28.50 per hour for wages alone ($146,319). This computation totally ignores the fact that, as is indicated in the record and conceded at the trial by counsel for Appellee (T. R. p. 312):

> "Mr. Stark. Mr. Hilger, at this point do I understand that these figures are going into the record covering the cost of timber, hauling, deliveries, for 100 per cent of *Snow Camp's production, of which we got only 40 per cent?*
>
> Mr. Hilger. The payroll, of course, relates to the entire operation. That is correct, yes.
>
> Mr. Stark. And with the exception of the footage of lumber——
>
> Mr. Hilger. Designated specifically as Timber, Inc.; otherwise they cover the entire operation.
>
> Mr. Stark. Under no theory could we be charged with more than 40 per cent.
>
> Mr. Hilger. *That would appear to be fairly correct.*" (Italics ours.)

We should be charged, if with anything, with no more than on 40% of the total production. In other words, instead of being chargeable, on Appellee's theory of damages on this item, with 5,134 hours "wasted", we should be chargeable only with 40% of such time or a

total of 2,053 hours, or a total (at $28.50 per hour) of only $58,510.00 instead of $146,319.00.

ARGUMENT.

1. SUMMARY JURISDICTION OF BANKRUPTCY COURT TO AWARD AFFIRMATIVE RELIEF UPON TRUSTEE'S OBJECTIONS TO A CLAIM FILED IS AT BEST DOUBTFUL.

As pointed out in Appellants' Opening Brief (pp. 12-14), there appears to be a conflict of authority between the 5th Circuit and the 10th Circuit, and between various District Courts throughout the United States aligning themselves, respectively, with the decisions of *B. F. Avery & Sons Co. v. Davis,* 1951, 192 F. 2d 255 (5th Cir.) cert. den. 342 U.S. 945 and *Inter-State National Bank of Kansas City v. Luther,* 1955, 221 F. 2d 382 (10th Cir.). We believe the better and more consistent theory and one more conducive to better bankruptcy administration and the rule most likely to produce substantial justice is that for which the 5th Circuit stands, viz: That summary jurisdiction does not lie in the Bankruptcy Court to grant affirmative relief to the Trustee against a creditor who has filed a claim.

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2. COMITY REQUIRED SURRENDER OF SUMMARY JURISDICTION BY THE BANKRUPTCY COURT TO THE STATE SUPERIOR COURT.

(a) In support of his contention that comity did not exist in the instant case, Appellee cites *Manter v. Howard,* 1949, 94 C.A. 2d 404. This decision is not in point because, in the *Manter* case, the parties pro-

ceeded to judgment in the State Court *after* the Bankruptcy Court had issued its restraining order preventing the parties from so doing. The Court held there, properly, of course, that the Trustee could set that judgment aside. This is not the case here. Appellants, at the outset, objected to the jurisdiction of the Bankruptcy Court and formally moved for permission to pursue the matter in the State Courts. In the case of *Heider v. McAllister,* 1958 (9th Cir.), 265 F. 2d 486, also cited by Appellee, we also find a clear distinction from the case at bar. In the *Heider* case, the Court found that the subject matter proposed to be litigated in the State Court was different from that which was proposed to be litigated in the Bankruptcy Court. In the case at bar, the subject matter of the two actions (Humboldt County Superior Court and the instant Trustee's Objections and Petition for Affirmative Relief) is identical.

(b) Although we will more fully discuss that subject later in this brief in connection with the "real party in interest", we here observe that at no time have we conceded that the real parties in interest in the State Court action, and in the controversy before the Bankruptcy Court are or were the same. The mere fact that Appellants moved to withdraw their claim and to have the issues raised by the pleadings tried in the State Court action prior to the trial in the Bankruptcy Court is not inconsistent with the present position of Appellants. It was only because of the adverse ruling of the Referee on our objection to his summary jurisdiction that we may urge that

the real party in interest here was not the Trustee but Snow Camp Logging Co., a corporation.

(c) Contrary to the observation of Appellee "that in Bankruptcy proceedings, comity does not prevail" (Appellee's Brief, p. 25), the decision of the U.S. Supreme Court in *Toucey v. New York Life Insurance Company,* 1941, 314 U.S. 118, 86 L. Ed. 100, *does not* so hold. The Supreme Court held that Section 265 of the Judicial Code deprives Federal Courts of the right to issue injunctions against proceedings just to save a defendant from the inconvenience of pleading and proving *res adjudicata.* In passing, the Supreme Court stated that Section 265 Judicial Code expressly excepts cases where such injunctions "may be authorized by any law relating to proceedings in bankruptcy". This merely affirms the well-known power of the Bankruptcy Court (11 U.S.C.A. 25(15), Bankruptcy Act Section 2(15)), to issue all types of injunctions, but does not, by any stretch of the imagination, deprive the Bankruptcy Courts or litigants of the benefits or relieve them from the burdens of the well-known equitable doctrine of "comity".

Appellants contend that the possible loss to a litigant of his right to a jury trial, where, as here, it is urged as part of the doctrine of "comity", is not itself dependent upon whether or not Appellants, or any particular litigants, undertake to avail themselves of that right. The fact that here the State Court case was re-set for trial without a jury, with the consent of Appellants, does not amount to a waiver of the right so far as comity is concerned.

The citation by Appellee of *Inter-State National Bank v. Luther,* supra (at Appellee's Brief, p. 27), to us only serves to emphasize the confusion which frequently occurs between the doctrine of the "summary jurisdiction" of a Bankruptcy Court and the equitable doctrine of "comity". The *Luther* case has no application to the subject of comity.

(d) While it is true, normally, as contended for by Appellee in his Brief (p. 28) that an injunction, issued by a Bankruptcy Court, may be "directly appealed", it is equally true that to avail oneself of the impropriety of an injunction issued by a trial court a litigant does not necessarily have to appeal from that Order where it is merely interlocutory. He may raise the point, upon appeal, as we have here, after suffering an adverse judgment at the hands of the trial court. Appellee has placed himself upon the horns of a dilemma in this regard. On page 28 of Appellee's Brief he contends that, since Appellants took no review from the injunction issued by the Referee herein we have no right to raise the point upon appeal. The injunction was issued (T. R. p. 162) in the course of the trial of this case. Appellants' "objection to the Referee's jurisdiction" and their "plea in abatement" were overruled. (As conceded in Appellee's Brief, pp. 2-3.) Not only was the injunction here issued by the Referee "without notice" as conceded by Appellee in his Brief (p. 29), but was only made in the course of the trial after our objection to his summary jurisdiction was overruled. Such orders are interlocutory in character and this Court has held such orders not

to be subject to direct appeal. (*Goldie v. Carr,* 1940 (9th Cir.) 116 F. 2d 335.) The inapplicability of the decision of this Court in *Danning v. United States,* 1958 (9th Cir.) 259 F. 2d 305 (Appellee's Brief, p. 31), to the case at bar is clear when one examines the decision and finds that this Court did not undertake to approve the rule in the *Nathan* case (supra) but merely recited that the parties to that action had *conceded* the point for which the case in question is here cited by Appellee. This point, Appellants here do *not* concede.

(e) On the subject of the obvious impropriety of the Referee in this case having undertaken to do indirectly that which he is prohibited from doing directly, i. e., restraining a State Court we reiterate the applicability of the decision of *Brehme v. Watson,* 1933 (9th Cir.) 67 F'ed 2d 359. The inapplicability of the decisions cited by Appellee on this point (his brief, pp. 34-35) is clear because the injunctions there granted by Bankruptcy Courts were not indirectly injunctions against State Courts but merely enjoined *individuals* from interfering with the due administration of the bankrupt estate by the Bankruptcy Court.

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3. APPELLANTS AT NO TIME CONSIDERED THE BANKRUPT THE REAL PARTY IN INTEREST IN THE STATE COURT ACTION.

(a) While it may be true the theory upon which this case was tried by Appellee was that the Bankrupt was the true owner of the contract and his Trustee in

Bankruptcy the real party in interest, at the outset, it will appear from Appellants' motion to withdraw this claim (T. R. pp. 37-38) that Appellants have consistently contended the contrary throughout this proceeding (T. R. p. 42) and have adopted the allegation (T. R. pp. 13-14) and the admission (T. R. pp. 22-30) in the pleadings in the State Court action that there had been an assignment of the contract by the Bankrupt to Snow Camp Logging Co., a corporation. We merely urged that comity required the identical subject matter be tried in the Court in which it first had become at issue and already set for trial. Immediately upon Appellee's adoption of the corporation's allegation of that assignment but at the same time his allegation that the assignment was made "without any consideration whatsoever" (T. R. p. 32), in Appellant's Response, *after* our motion to withdraw the claim and to have the case tried in the State Court was denied by the Referee on the Trustee's objections thereto we challenged the Trustee's theory. (T. R. p. 42.) At no place in the record by evidence, oral or documentary, did the Trustee introduce proof to support his allegation that the assignment was "without any consideration". Hence, since there was no issue ever raised by us as to the existence of the assignment from the bankrupt to the corporate plaintiff that was an established fact and, as such, required no proof. Whether or not pleadings are evidence is thus immaterial, *but* the issue as to the lack of consideration for the assignment not only was susceptible of but also required proof, and the burden was on Appellee to

prove it since he had alleged it and he completely failed to do so.

(b) Appellee's first attempt to answer Appellants' contention that the bankrupt had assigned the contract before bankruptcy and had no rights in the same is to assert that Appellants considered the Bankrupt as the real party in interest. Even if true, this would not take the place of proof necessary to establish the Trustee's allegations of his "counterclaim." (T. R. pp. 31-33.) However, there is no basis for Appellee's argument. As we have said above, in the State Court proceeding the plaintiff alleged the assignment and it was *admitted* by Appellants. Thus no issue was ever joined as to the contract in question having been assigned by the Bankrupt to the corporation. Appellants' motion to proceed in the State Court was denied and the Referee forced Appellants to try the case on its merits. However, this did not shift the burden of proof and require Appellants to prove the allegations of the Trustee's counterclaim. This seems to be the basis of Appellee's argument. Appellee is in error in stating that the only evidence indicating a possible assignment were the State Court pleadings. The counterclaim filed by the Trustee (T. R. p. 32), in effect, admits the assignment.

Appellee cites many cases holding that in the determination of the real party in interest and in placing the burden of proof the Federal Courts will apply State law. This is not disputed, and we would even emphasize the point and urge that one of the cases cited by Appellee sustains the very contention

made by us. *New York Life Insurance v. Rogers,* 1942 (9th Cir.) 126 F. 2d 784, at 788. This case held that where a defendant alleges affirmative matter on which it intends to rely the issues are thereby so narrowed that the burden is on the defendant to show by a preponderance of evidence the existence of the facts so alleged by it.

> "The Supreme Court of Arizona has recently held that, although the burden of proof on the whole case never shifts, yet when the defendant by its answer admits allegations of the complaint sufficient to make out a prima facie case for the plaintiff, and then alleges further affirmative matters on which it intends to rely, the issues are thereby so narrowed that the burden is on the defendant to show by a preponderance of the evidence the existence of the facts so alleged by it, and an instruction to that effect is not erroneous."

In the case at bar, the allegations being part of the counterclaim (T. R. p. 32) and not just a mere defense the burden is even more specifically placed upon Appellee.

> *Allis-Chalmers Mfg. Co. v. U.S.,* 79 Ct. Cl. 453; *New York Life Ins. Co. v. Rogers* (supra).

Thus, Appellee's admission of the assignment of the contract (T. R. p. 32) and his allegation that the assignment was without any consideration and that the claim "is a valuable asset of the estate" has raised an issue of ultimate fact and the burden of its proof is upon Appellee.

(c) Appellee next contends that even though he did allege in his counterclaim that the contract was assigned by the bankrupt this is not evidence; and in support of this argument cites numerous cases to the effect that pleadings are not evidence *in support* of the pleader. This also we admit, but point out that Appellee has cautiously evaded the point made in Appellants' Brief, which is that an admission contained in a pleading is admissible *against* the pleader thereof.

Pullman Co. v. Bullard, 44 F. 2d 347;
Howard v. Halstead, 298 F. 1020;
New Jersey Zinc v. Singmaster, 4 F. Supp. 967;
Giannone v. U.S. Steel Corp., 238 F. 2d 544.

Appellee then seems to believe it necessary to cite authorities to establish that it is only necessary to plead ultimate facts and not evidentiary matters. Our point is that Appellee has not pointed out and cannot point out any "evidentiary matter" in the record to establish the ultimate fact of ownership of the contract as alleged by Appellee in his counterclaim. Although Appellee's Brief (p. 37, 5a) commenced this line of argument with the contention that there was evidence supporting the Finding that the Trustee owned the rights under the contract, not one reference supporting this argument has been made to the record, except to the opinion of the District Judge which was not supported by any evidence in the record. The District Judge apparently did not read the record very carefully or he could not have made the statement (which was part of his Memorandum and Order):

> "the only record before this Court is the transcript of proceedings had to determine which party breached the contract, and the extent of the damages. The issue of ownership was decided adversely to petitioners before that time". (T. R. p. 74.)

The transcript before him was complete and showed that there were *no other proceedings* which had decided the issue of ownership, and the errors of the Referee were specifically pointed out to the District Judge. (T. R. p. 62, paragraph 19.)

As if in desperation, Appellee seizes upon this remark of the District Judge to contend that somewhere else there exists support for the assertion that Appellee was in fact the true owner of the contract which was in litigation in the Humboldt County Superior Court and says (his brief, p. 43): "In any event the burden is upon the Appellants to point out *specifically* the error of the Court below and the *recorded facts* demonstrating the error", citing *Humphries Gold Corporation v. Louis,* 1937 (9th Cir.), 90 F. 2d 896. Without having brought forward the record surrounding the ruling, how can Appellants successfully attack or criticize it? The full answer to that argument is that the District Court had before it the entire record with all the testimony and all the exhibits introduced at the hearing of Appellee's objection to Appellants' claim upon which arose the judgment and decree against Peters for the huge sum involved in this appeal.

Appellee grasps at straws in trying to establish an analogy here with promissory note-contract cases holding that the presentation of a promissory note duly endorsed to the plaintiff entitles the Court to presume that plaintiff was its owner. A promissory note is evidence of indebtedness. In order to establish such an analogy an additional (and unwarranted) assumption would have to be made. Suppose the promissory note had an endorsement showing it had been assigned to a party other than the plaintiff. Would the Court make any assumption without some showing of a right in the plaintiff? Here, Appellee admitted an assignment by his predecessor in interest. This was evidence to negate any presumption of ownership in Appellee yet he failed to offer any proof of the ultimate fact alleged, viz: that the claim was "an asset of the estate of the Bankrupt".

Appellee's only argument on this subject that we believe has merit is the statement that this case should be decided on proof and not on pleadings. *Proof of the ultimate fact by the party bearing the burden of proof.* (Appellee.) The pleadings set forth the issues of the case as joined by the parties. It is submitted that, after admitting the assignment and alleging the lack of consideration therefor and that the contract was (therefore) an asset of the bankrupt estate, not one word or document tending to prove this ultimate fact of ownership, alleged by him, was offered by Appellee.

4. THERE WAS AN ANTICIPATORY BREACH OF THE CONTRACT BY THE BANKRUPT.

We submit that Appellee, in his brief, has not successfully answered points raised by Appellants in our Opening Brief on the above subject. Contrary to the observation of Appellee that for the entire period of 1953 actual production was shown to be approximately 2,200,000 feet per month (his brief, p. 49), Trustee's Exhibit No. 15 (as was pointed out in A.O.B. pp. 38-39) showed it to be only 2,020,606 feet per month. (Exhibit 15 is a summary of Exhibit 14.) That "ganglogs can also be called studlogs" is not a "gratuitous statement" (as contended by Appellee on page 52 of his brief). See T. R. p. 365:

> "Q. I understand that. As a matter of fact, a gang log and a stud log is a similar log, is it not?
>
> A. To a degree, yes. . . .
>
> Mr. Goodwin. Mr. Vander Jack already testified that stud logs and gang logs are similar logs.
>
> Mr. Margolis. He did not say very similar. He said similar, yes. I will stand on the record.
>
> The Referee. Let's see what Mr. Vander Jack said. I think you are both misquoting what he said."
>
> * * * * * * *
>
> "* * * Gang logs can also be called stud logs. You can cut them to dimension."

---

5. ATTEMPT OF APPELLANT PETERS TO TESTIFY AS TO CONTENTS OF RECORDS WITHOUT PRODUCING SAME; AND THERE WAS AN ACTUAL BREACH BY THE BANKRUPT.

Appellee carefully refrains from calling the Court's attention to the fact that, as is indicated in the rec-

ord (T. R. pp. 456-459) Appellants' offer to produce such records was conditional, not unqualified and we were never ordered to produce them.

> "Mr. Stark. . . . Now, we will produce these records *if we conclude,* after consulting with each other, *that it is vital* to the *interests of our client* that we produce them. But we don't want to keep your Honor sitting here day after day with time we can ill afford to spend, when this witness, as the head of this company, is prepared to say unequivocally that, after Mr. Vander Jack left the scene of this debacle, he was required to go out at additional expense, the amount of which he knows of his own knowledge, and get fodder for his mill." (Italics ours.) (T. R. pp. 458-459.)

Apparently, Appellee does not find fault with our argument that "there was an actual breach by the bankrupt" of the contract in question (see A.O.B. pp. 28-31); nor does Section 1855 of the California Code of Civil Procedure constitute authority which would support the Referee's rejection of the secondary evidence to which due exception was taken by Appellants. As additional support for our previous assertion that the Bankrupt itself was in default under the timber contract *prior* to the alleged breach thereof by Appellants on October 21, 1953, we cite (in Appendix "F") competent uncontradicted testimony on the subject. This indicates clearly that the Bankrupt, Snow Camp Logging Co., sold, contrary to the provisions of paragraph 8, of the June 1, 1951 Agreement, gang-type logs from the Redwood Creek area after Appellants were in full production. We also

cite (in Appendix "F") some evidence to show that Appellants did not buy logs elsewhere until *after* the Bankrupt stopped deliveries.

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6. THERE WAS AN ACCORD AND SATISFACTION BETWEEN THE BANKRUPT AND APPELLANTS.

An examination of Appellee's brief on the above subject will indicate that there is little, if any, difference between the parties as to the law involving the doctrine of "accord and satisfaction". Appellee apparently takes little issue with Appellants' citation of evidence to support our contention that there was a bona fide dispute between the parties which would give rise to the accord and satisfaction. Appellee, on page 57 of his Brief, blithely indicates in testimony the witnesses' conclusion "there was no dispute about that". However, Trustee's Exhibit No. 4 (Appendix "C", A.O.B., Trustee's Exhibit No. 5, and Claimant's Exhibit No. 4 (Appendix "B", A.O.B.) all constitute evidence supporting the existence of a bona fide dispute, which is all that is required to support the accord and satisfaction for which Appellants contend. The mere conclusion of the witness C. C. Vander Jack (T. R. p. 403) that there was no dispute cannot support the Referee's finding to that effect in the face of the documentary evidence to the contrary.

7. THE ASSESSMENT OF DAMAGES MADE BY THE DISTRICT COURT WAS CLEARLY ERRONEOUS.

Appellee seems to have just as much trouble in trying to justify the award of damages as Appellants had in determining how the damages were computed in the light of the evidence before the Referee.

Because we stated in our brief that we understood how the Referee arrived at the sum of $19,625.91 *if* his Finding No. 10 (T. R. p. 49) were correct and how he arrived at the sum of $30,931.57 *if* his Finding No. 11 (T. R. p. 50) is correct, Appellee has assumed, without any basis, that we concur in these items. We do not. We have already discussed the Accord and Satisfaction involving the $19,625.91. As to the purported loss of truck earnings of $30,931.57, there is no evidence to support this figure. Appellee admits that the burden of proof on items of damages rested with him, yet he fails to point to any evidence in the record which shows that the Bankrupt ever earned $3,000.00 per month gross per truck and that, were it not for Appellants' purported breach, it would ever have earned it. In fact, the evidence showed that the Bankrupt actually earned $105,000.00, less than the $3,000.00 per truck average, only 30% of which was chargeable to Appellants. The Bankrupt didn't earn at the $3,000.00 per month per truck rate even on the other 70%.

Appellee's attempt to point out the basis for the award of $146,319.00 for disruption of normal procedures is even more vague and equally erroneous. If allowable at all, this item could not exceed $58,510.50 as pointed out by us, in our Statement of Facts, supra.

It is admitted that Appellants only received 40% of the lumber hauled by the Bankrupt and could only be charged with 40% of the total costs. (T. R. p. 312.) Yet, the award of damages for "disruption of normal operating procedures" is not limited to 40% of the operating costs involved in the so-called 30% loss of efficiency caused by Appellants' purported mismanagement. Trustee's Exhibits Nos. 14-18 (T. R. pp. 297-321) nowhere reflect this situation nor do they throw light on the method used in the computation of damages.

In discussing the award of $477,750.99 Appellants proved an actual mathematical error on the part of the Referee to the extent of at least $53,083.49. (A.O.B. pp. 38-39.) Appellee did not have the temerity to meet this issue honestly and concede the obvious. He states (Appellee's Brief, p. 60) that it cannot be concluded that the damages were computed on this basis. Yet, Appellee points to no other basis for such computation of damages. (Trustee's Exhibit No. 15.) This type of quibbling is typical of the entire lack of ability on the part of Appellee to pinpoint any evidence in the record to support the Referee's award of damages. Appellee admitted that he was required to prove damages but here again he goes outside of the record to try to support the Referee's award. We argued (A.O.B. p. 40) that Bankrupt did not have sufficient lumber to supply Appellants for a period of 91 months, the unexpired term of the contract considering the fact that Appellants only received 40% of the total supply. Apparently, Appellee has to concede this but attempts to overcome this dis-

astrous fact by stating that this argument does not take into consideration "future acquisitions of inventory". There is no evidence in the record of the Bankrupt building up inventory nor acquiring any. Here again, Appellee failed to meet his burden of proof. He would have to show, not only that inventory would be available, but also that Bankrupt could and would have acquired it in the immediate vicinity so that it would still be in a position to enjoy the $2.31 per thousand price advantage. It was only because of the location of this timber and the fact that it did not have to be hauled over State or County roads it could be delivered to Appellants' dump at a $2.31 per thousand advantage to the Bankrupt. If the Bankrupt had to pay extra or even normal hauling charges on the so-called "future inventory acquisition" (the existence of which does not appear in the record) there would be no such, nor any advantage. The burden of establishing all items of damage must be borne by Appellee.

Hahn v. Wilde, 211 C. 52, 293 P. 30;

Parke v. Frank, 75 Cal. 364;

Tremorli v. Austin Trailer Equip. Co., 102 C.A. 2d 464; 227 P. 2d 923;

Kowtko v. Del. & Hudson R. R. Corp., 131 F. Supp. 95;

Continental Oil Co. v. Fisher Oil Co., (10th Cir.) 55 F. 2d 14;

Louisiana Power & Light Co. v. Sutherland Specialty Co., Inc., (5th Cir.) 194 F. 2d 586;

Sapp v. Barenfeld, 34 C. 2d 575, 212 P. 2d 233.

The contract (T. R. p. 6) contemplates that the timber would be supplied from the Redwood Creek Ranch and vicinity. The evidence showed the maximum amount that could be realized from this area and that it would be insufficient to supply the quantity of timber required by Appellants over the 91 months term remaining under the contract, considering that Appellants only received 40% of the total amount logged by Bankrupts. Timber is not like merchandise which may be obtained anywhere, anytime, and Appellee apparently concedes this in stating (Appellee's Brief, p. 50):

> "The contract contemplated the operations of both parties in the Redwood Creek area only (T. 6, T. 9, Section 13, T. 10, Section 17), and accordingly obligated log production of the Sellers in that area only."

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8. DISTRICT COURT'S ORDER IS ITSELF ERRONEOUS.

Appellee's final argument brings out a point which is not disputed but which, as we have pointed out on several occasions, is not involved here. We concede that unless it can be shown that the Court's findings of fact are clearly erroneous, they should not be set aside. We further concede that where a Finding of a Referee or Judge is based on conflicting evidence, it will not ordinarily be disturbed on appeal. However, it is equally true (and we believe this to be the situation before this Court), that a finding supported by no evidence or which in fact is an erroneous conclu-

sion (factual or otherwise) drawn from undisputed testimony may be disregarded by the Appellate Court which can draw its own inference or conclusions from such non-conflicting testimony.

Costello v. Fazio (9th Cir.) 256 F. 2d 903;
In re Morasco (2d Cir.) 233 F. 2d 11;
Sheldon v. Waters (5th Cir.) 168 Fed. 2d 927.

> "Ordinarily, when a Referee in Bankruptcy has made findings of fact based on conflicting evidence, and the Referee has actually heard the witnesses, great weight is attached to his conclusions, and they will not be disturbed unless 'clearly erroneous' . . . *But where credibility of witnesses is not involved and the facts are undisputed, the District Judge and the Court of Appeals can more freely draw differing inferences from the undisputed facts.*" (*In re Morasco,* supra, at page 15.)

Appellants' specifications of error in the findings as previously pointed out are based on the fact that they are, in many cases, unsupported by any evidence or that the legal inference or "factual conclusion" drawn from undisputed facts is incorrect or that certain specified rulings of the Referee were prejudicially erroneous.

We believe that we have demonstrated in an unanswerable manner at least two startling mathematical errors made by the Referee in Bankruptcy in this award of so-called damages for the breach of the contract and which award was in toto adopted by the District Court and we earnestly contend that no man

should be deprived of the fruits of a lifetime of labor on the basis of the record which is presently before this Court and we submit that the Memorandum and Order of the District Judge made on October 30, 1958, affirming the Order, Judgment and Decree of the Referee in Bankruptcy dated March 25, 1958, should be by this Court reversed with appropriate directions to the District Court.

Dated, San Francisco, California,
September 14, 1959.

Respectfully submitted,
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(Appendix "F" Follows.)

Appendix.

Appendix "F"

Testimony of Dan Dare.

Transcript of Record, page 224.

"Q. Referring to the summer(ary) of 1953, did you buy any logs at that time from Snow Camp Logging or Vander Jacks?

A. Yes.

Q. That was for Western Studs?

A. Uh-huh.

Q. What type of lumber does a mill such as Western Studs produce?

A. Studs."

Transcript of Record, page 225.

"Q. Now in the *summer of '53* upon what basis did you buy logs from Snow Camp Logging Company?

A. Camp run.

Q. Where is the Western Stud mill located?

A. Just north of Arcata on Highway 299.

Q. That would be described as in the Arcata area?

A. I think so.

Q. Did you, in connection with your purchase of these logs from Vander Jack, make any inspection of their timber source?

A. What do you mean?

Q. Did you go out and look at the woods that they were operating in?

A. Yes.

Q. And you observed the type of tree and type of timber that they had available?

A. Uh-huh.
Q. Did you also observe their operation?
A. Uh-huh.
Q. Was that *in the Redwood Creek area?*
A. Uh-huh." (Italics ours.)

Testimony of Benjamin A. Dare.

Transcript of Record, page 238.

"Q. Were you so employed during the summer and fall of 1953?
A. Yes; I was.
Q. And that was as log buyer at Sound Lumber Company?
A. Correct.
Q. Now is that a dimension mill?
A. Yes.
Q. Did you, on behalf of Sound Lumber Company, in the summer of 1953, buy any logs from Snow Camp Logging Company or Vander Jacks?
A. Yes; we did.
Q. Those come from their timber show in the Redwood Creek area?
A. Yes; they did."

Testimony of Gordon Walker.

Transcript of Record, page 332.

"Q. Did you deliver any logs to Timber, Inc.'s, sawmill as long as Vander Jacks were delivering logs there?
A. Not to my knowledge, no.
Q. The deliveries started after he quit?
A. Yes."